BLANK

PAGE

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
JAN 3 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 832

JAMAICA TIME PETROLEUM, INC.,
Petitioner,

vs.

FEDERAL INSURANCE COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

MARTIN J. PURCELL
1700 Bryant Building
Kansas City, Missouri 64106.
LAWRENCE WEIGAND
830 First National Bank Building
Wichita, Kansas 67202
Attorneys for Respondent

Associate Counsel:
WILLIAM A. RUNDLE, JR.
1700 Bryant Building
Kansas City, Missouri 64106
BYRON BRAINERD
830 First National Bank Building
Wichita, Kansas 67202
Of Counsel:
MORRISON, HECKER, COZAD & MORRISON
WEIGAND, KURFMAN, BRAINERD, HARRIS & KAUFMAN

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-8080

BLANK

PAGE

INDEX

Jurisdiction 1

Statement of the Case 3

Reasons for Denying the Writ—

I. The Payment of $1,000.00 to the Mother of the Witness Conn Was Not a Witness Fee and Was for Information Only Not Contingent Either upon the Testimony of Conn in Court nor upon the Outcome of the Litigation 8

II. The Issue of Adverse Pre-Trial Publicity Is Not Supported by the Record and Not Raised in the Courts Below and May Not Be Raised Here 12

Conclusion 13

Table of Cases

Blackburn v. *Alabama*, 361 U.S. 199 8

Brown Shoe Company v. *U. S.*, 370 U.S. 294 (1962) 1

Ellis v. *Dixon*, 349 U.S. 458 (1955) 12

Helvering v. *Minnesota Tea Co*,, 296 U.S. 378 (1935) 12

Hyde v. *Shine*, 199 U.S. 62 (1904) 1

International Shoe Company v. *Washington*, 326 U.S. 310 (1945) 8

Irwan v. *Dowd*, 366 U.S. 717 8

Kinsella v. *U. S.*, 361 U.S. 234 8

Rice v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955) 2

State of Kansas v. *Poulos*, 196 Kan. 253, 411 P.2d 694 (1966), cert. denied 17 L.Ed.2d 64 (1966) 11

Ullman v. *U. S.*, 350 U.S. 422 (1956) 9

United States v. *Bryan*, 339 U.S. 323 (1949) 9

Statutes

Supreme Court Rule 19 ..... 1, 2

Title 28, U.S.C., §1254(1) 1, 2

BLANK

PAGE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 832

JAMAICA TIME PETROLEUM, INC.,
Petitioner,

vs.

FEDERAL INSURANCE COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

JURISDICTION

Jurisdiction is contended for by Petitioner under Title 28 U.S.C. §1254(1), but granting of the Writ is discretionary with the Court and not a matter of right. *Hyde* v. *Shine*, 199 U.S. 62 (1904); Supreme Court Rule 19(1). Inquiry as to jurisdiction is appropriate in every case. *Brown Shoe Company* v. *U. S.*, 370 U.S. 294 (1962).

Respondent submits that jurisdiction as granted by 28 U.S.C. §1254(1) is to be exercised within the framework of Supreme Court Rule 19, which provides in part:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are *special and important* reasons therefor. . . ." (Emphasis supplied)

There is no showing here of a "special" or "important" reason invocational of jurisdiction. This was, and remains, a private dispute between private corporate parties concerning a private matter in which there is no public interest. Neither is there presented by the Petitioner in its jurisdictional claim any reasons characteristic of those contained in Rule 19(1)(a) and (b) to bring this case within the jurisdiction of this Court.

In dismissing the Writ in *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955), Mr. Justice Frankfurter stated, 349 U.S. at 73:

> "This Rule [Rule 19], formulated 30 years ago, embodies the criteria, developed ever since the Evarts Act of 1891, by which the Court determines whether a particular case merits consideration, with due regard to the proper functioning of the limited reviewing power to which this Court is confined, decisively restricted through the creation of the intermediate Courts of Appeals and more largely confined by the Judiciary Act of 1925. . . .'

and further, 349 U.S. at 74:

> ". . . But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. . . ."

and further, 349 U.S. at 79, (quoting Mr. Chief Justice Taft in an earlier case):

". . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, . . ."

STATEMENT OF THE CASE

Being of the opinion that Petitioner's (Plaintiff and Appellant below) Statement presents some inaccuracies and only a portion of the facts necessary to a complete understanding of the case by the Court, Respondent hereinafter sets forth a supplemental statement.

The corporate Petitioner, Jamaica Time Petroleum, Inc., was formed in 1938 (R. 53) or 1959 (R. 78) as a "closed corporation" (R. 78) with an issue of one thousand shares of stock, nine hundred shares of which were owned by Rudolph R. Greenbaum and his wife (R. 53). Aside from the Greenbaums there were only two other stockholders (R. 53). This was still the situation as of April 12, 1962 (R. 53), the date of the destruction of the aircraft in question. The Petitioner corporation was specifically formed to acquire and explore an oil and gas concession on the Island of Jamaica (R. 53, 79). This did not prove to be a successful operation (R. 53, 79) and the concession expired in 1963 (R. 53, 80). The loss to Petitioner was One Hundred Thirty-Eight Thousand Dollars ($138,000.00) (R. 80) and was claimed as a loss in the amount of One Hundred Thirty-Five Thousand Three Hundred Forty-Three and 29/100 Dollars ($135,343.29) for income tax purposes in 1963 (R. 81). In the meantime, Mr. Greenbaum and his wife had loaned the Petitioner corporation One Hundred Fifty-Three Thousand Dollars ($153,000.00) (R. 54). As of April 12, 1962, the date of the destruction of the aircraft, the book value net worth of the Petitioner was Five Thousand Dollars ($5,000.00) (R. 54, 81).

In the fall of 1961, Petitioner purchased a Lockheed Lodestar airplane (R. 47, 55) *which is not the airplane which is the subject of this litigation* (R. 55). This airplane was used in Petitioner's business and at least as of the time of trial was still owned and used by Petitioner (R. 55). However, early in 1962, Petitioner, through Greenbaum, using money borrowed from his wife (R. 85), purchased a second Lockheed Lodestar airplane (R. 49), *the aircraft with which we are concerned here and for which Petitioner had no operational use whatsoever* (R. 55, 84).

Following the purchase Greenbaum contacted an insurance brokerage firm at Wichita and requested a One Hundred Thousand Dollar ($100,000.00) insurance policy on this airplane (R. 67-70, 156), and represented the worth of the aircraft to be in that amount (R. 157). Ordinarily Petitioner's insurance affairs were handled by another corporate officer, Mr. Loux (R. 69), but this insurance transaction was handled by Greenbaum personally (R. 69). It was Greenbaum's suggestion that a One Hundred Thousand Dollar ($100,000.00) policy be obtained (R. 70, 87, 157) and this was accomplished by a Mr. Hill of the Wichita insurance firm through an aviation insurance management company, Associated Aviation Underwriters (R. 88), who placed the coverage with Defendant. According to Associated Aviation Underwriters, Mr. Hill represented the purchase price as One Hundred Thousand Dollars ($100,000.00) (R. 89, 90). The spare parts were trucked to Wichita (R. 61) and separately insured for Thirty Thousand Dollars ($30,000.00) (R. 62).

The aircraft in question (the second Lockheed Lodestar) was purchased by Greenbaum with his wife's money (R. 85) from Manufacturers Hanover Trust in New York (R. 27, 56) through an aircraft broker, one Mr. Wilmer

D. Crawford of Teterboro, New Jersey, whose deposition was read into evidence by Petitioner (R. 26-34). The airplane was never seen nor inspected by Greenbaum prior to purchase and its arrival in Wichita (R. 61). This aircraft originally had been manufactured for the military (R. 27) and was at least twenty years old at the time of purchase by Greenbaum (R. 28). It "could be actually considered in the nature of an antique. It was an outmoded airplane and out of manufacture even to the point of spare parts now being somewhat of a problem for the airplane since they are out of new manufacture" (R. 32). Nothing had been done to upgrade the airplane since 1947 (R. 31) and it was obsolete (R. 32).

The aircraft was offered for sale together with a large quantity of spare parts (R. 31) as a package (R. 61) and the entire package was purchased by Greenbaum for Thirteen Thousand Five Hundred Dollars ($13,500.00 (R. 31, 61). Half of the purchase price should be allocated to the airplane and half to the spare parts (R. 31). According to Mr. Bangiola, Greenbaum's pilot, "at least seventy-five percent" of the spare parts, including two remanufactured engines, were usable on the first aircraft (R. 92-93) purchased by Petitioner and which Petitioner was still using at the time of trial (R. 55), but Petitioner had no use for the second airplane itself (R. 55, 84). It was Greenbaum's further testimony that the aircraft in question had "excellent guidance gear and electronics" (R. 55) which he expected to install in his first aircraft (R. 55-56) but it was his pilot's testimony that such an exchange would be a "waste of money" (R. 94). It was the further testimony of the pilot that the spare parts acquired in the purchase were worth Twenty-Five Thousand Dollars ($25,000.00) (R. 95) or Fourteen Thousand Dollars ($14,000.00) to Fifteen Thousand Dollars ($15,000.00) (R. 96). It was the pilot's idea to

keep the spare parts and sell the airplane (R. 96) . Spare parts for Lockheed Lodestars were difficult to obtain at that time (R. 93). Greenbaum denied that the aircraft was offered by Petitioner for sale generally (R. 62) but he was contradicted in this by his pilot who stated that it was placed in the hands of a broker for re-sale at a price of Twenty-Five Thousand Dollars ($25,000.00) and that this was authorized by Greenbaum (R. 96). He was further contradicted in this by his answer under oath to Respondent's pre-trial interrogatories wherein he had stated, "The aircraft was offered for sale" (R. 63-65). A period of time of one month elapsed between the arrival of the airplane in Wichita from New Jersey and its destruction on the night of April 12, 1962 (R. 96). During this period the aircraft was not used on company business and no removal of radio equipment was attempted (R. 96). The airplane merely remained parked in the general tie-down area at the Wichita Municipal Airport near the Municipal terminal building (R. 96). Actual use of the airplane was never discussed between Greenbaum and his pilot (R. 97). It was just a matter of reselling it (R. 97).

A day or two before the aircraft was destroyed it was flown around the field for the first time since its arrival in Wichita (R. 96) and engine trouble developed (R. 97). It was landed and taken to a place in front of a hangar (R. 97) in a very deserted and dark area of the field (R. 98) where it was destroyed the following night (R. 97). Greenbaum had been advised by the pilot as to the aircraft's location (R. 97), a fact that Greenbaum could not "remember" at the trial (R. 72). On the night of the destruction the pilot was called to the scene and upon seeing the burning aircraft, so advised Greenbaum at his home by telephone who responded only by asking if anyone was hurt (R. 98). At no time on the night of the destruction

or at any time later did Greenbaum visit the scene or view the airplane (R. 61, 99).

That the Respondent produced sufficient evidence of the deliberate destruction of the aircraft was conceded by Petitioner at page 8 of its Brief filed in the Court of Appeals, which concession is recognized and accepted in the opinion of the Court of Appeals, *Jamaica Time Petroleum, Inc.* v. *Federal Insurance Company,* 366 F.2d 156 (1966). The deliberate destruction was further confirmed by Captain Bevis of the Wichita Police Department (R. 112) and Eldon A. Means, a consulting chemist (R. 115). It was the testimony of one Rex Rudolph Conn (R. 115-154) that he was engaged by one George Poulos, a "local hoodlum" or "underworld character" (R. 105), in concert with one Eugene McCroskey, an ex-convict (R. 106), and one James Dolan, a known criminal (R. 106, 121), to destroy the airplane (R. 120). This they accomplished by lighting a fuse protruding from a satchel which they had placed under the airplane (R. 121-122, 127-128). Subsequently McCroskey and Conn pleaded guilty to the destruction (R. 106) and Poulos was convicted of the same in the District Court of Sedgwick County, Kansas, which conviction was affirmed by the Supreme Court of Kansas. *State* v. *Poulos,* 196 Kan. 253, 411 P.2d 694 (1966), cert. denied 17 L.Ed.2d 64 (1966). Respondent offered to prove by the witness Conn that George Poulos had been hired by Greenbaum to have the aircraft destroyed for a sum of Twenty-Five Thousand Dollars ($25,000.00) (R. 136) but was not permitted to do so by the District Court (R. 123-127).

Petitioner's assertion "Conn was paid $1,000.00 to testify" is not supported by the record. The record does reveal that during its investigation into the destruction, Respondent offered to pay Conn's mother the sum of One Thousand Dollars ($1,000.00) in the event Conn would give

any information he had leading to a solution of the destruction of the aircraft (R. 117, 118) which was eventually done (R. 118). Thereafter Conn was asked to relate his information to the Wichita police, which he did (R. 118) and only thereafter was he asked to testify (R. 119). As late as forty-eight hours before Conn's appearance as a witness he was again advised by counsel that he was under no compulsion to testify (R. 153). That the District Judge found nothing improper with respect to the payment of the money in return for information is amply set forth in the record (R. 24-25, 127). In its opinion on this point the Court of Appeals states, 366 F.2d at 158: "The offer and payment of the reward were not contingent either on the testimony of Conn in Court or on the outcome of any litigation."

REASONS FOR DENYING THE WRIT

I

The Payment of $1,000.00 to the Mother of the Witness Conn Was Not a Witness Fee and Was for Information Only Not Contingent Either upon the Testimony of Conn in Court nor upon the Outcome of the Litigation

While Respondent has no quarrel with the law relative to due process cited by Petitioner under Section I-A of its Petition (p. 9) Respondent does respectfully submit that the authorities therein cited have no application to this case. *International Shoe Company* v. *Washington,* 326 U.S. 310 (1945) cited by Petitioner (p. 9) treated with the application of a process statute of the State of Washington to a foreign corporation. The three remaining cases cited at page 10 of the Petition (*Kinsella* v. *U. S.*, 361 U.S. 234; *Irwan* v. *Dowd,* 366 U.S. 717; *Blackburn* v. *Alabama,* 361 U.S. 199) are criminal cases. Such law is hardly applicable to the case at bar.

At Section I-B of its Petition (pp. 10-11) the Petitioner apparently asserts, and would have this Court believe, that witnesses may be compelled to testify even adversely to themselves and cites in support *United States* v. *Bryan*, 339 U.S. 323 (1949), and *Ullman* v. *U. S.*, 350 U.S. 422 (1956). These cases do not support the proposition contended for by Petitioner in that the *Bryan* case recognizes that witnesses do enjoy some exemption and privilege from testifying and the *Ullman* case involves the privilege afforded by the Fifth Amendment.

Petitioner claims that witnesses (presumably including Conn in this instance) may be compelled to appear and testify but even Petitioner must recognize that here it would be legally impossible to compel Rex Conn to testify against himself with respect to his participation in the destruction of the aircraft in question. The fact is that he did comply with Petitioner's "Duty to Testify" by voluntarily appearing in open Court without inducement of any kind (R. 117-119, 163) and submitted himself to criminal prosecution (R. 119) thus lending further support to his credibility.

Petitioner seeks to convince this Court that Conn was "paid to testify" and that he gave "perjured testimony" by bald statements to this effect wholly unsupported by the Record, when the fact is that the Record is replete with testimony, findings and judicial opinion to the contrary (R. 24-25, 117-119, 127, 153). On this point the trial judge stated to Petitioner's trial counsel (R. 127):

> ". . . with respect to what counsel has done in this case, I say to you very frankly that I see nothing wrong with what in an effort to obtain knowledge of this, of the conduct which has so far been disclosed to me and I say that to you because there are some portions of part of one of your briefs which you ask to withdraw and which I permitted you to do, . . ."

In this same respect the Court of Appeals for the Tenth Circuit stated, 366 F.2d at 158:

> "The offer and payment of the reward were not contingent either on the testimony of Conn in Court or on the outcome of any litigation.
>
> * * *
>
> ". . . When the insurer offered and paid the reward it took a calculated risk of securing usable and believable information."

Under Section I-C of the Petition (p. 12) it is contended that the Writ should issue because of the "Effects Of The Payment Of Excessive Compensation To A Non-Expert Witness." In purported support of this proposition Petitioner cites numerous cases all of which involve contracts with persons to testify in litigation. To prove that no such contract existed here and that Petitioner's authorities are not in point, Respondent respectfully invites the Court's attention to the words of Judge Breitenstein as contained in the affirming opinion of the Court of Appeals for the Tenth Circuit in this case, 366 F.2d at 158:

> "The rule that a non-expert cannot enforce a promise to pay compensation for his testimony because of the invitation to perjury which would contravene public policy is not pertinent here. We are not concerned with any dispute over failure to pay. Conn's mother received the $1,000.00.
>
> * * *
>
> ". . . The information given by Conn related to a past event. This is a civil case. We are not concerned with decisions which deal with contingent fee agreements to produce evidence against particular persons for crimes not yet committed. . . ."

Whether or not petitioner sees fit to recognize it, the only possible attack upon the witness Conn must be limited to (1) competency under the Kansas statutes, and (2) credibility.

The Kansas Supreme Court, in one of the criminal prosecutions which arose out of the destruction of this airplane, *State of Kansas* v. *Poulos,* 196 Kan. 253, 411 P.2d 694 (1966), cert. denied 17 L.Ed.2d 64 (1966), in quoting a portion of and construing K.S.A. 60-407 stated:

> "Except as otherwise provided by statute (a) every person is qualified to be a witness. . . ."
>
> "This section is the keystone of the entire system of Rules of Evidence provided in Article 4 of the Code of Civil Procedure. It abolishes all pre-existing disqualifications and privileges of witnesses and wipes the slate clean of all other exclusionary rules, leaving the one requirement for the admissibility of evidence, that of relevance. If the evidence is relevant to the issue being investigated, the jury is permitted to receive it, unless some other rule of exclusion or privilege, as announced in Article 4 or other statutes, causes the evidence to be excluded. (4 Vernon's Kansas Code of Civ. Proc., pp. 198, 199.) Under this section, a witness is presumed to be competent to testify. His incompetency, therefore, must be challenged and the burden of establishing incompetency rests on the challenger. (4 Vernon's Kansas Code of Civ. Proc., p. 269.)"

Conn's credibility as a witness was for the jury to determine under a proper instruction, which appears in the Record at page 167. As is pointed out in the opinion of the Court of Appeals for the Tenth Circuit in this case, 366 F.2d at 158:

> "The question of the credibility of Conn was for a jury and was submitted to them *under instructions which are not here attacked and which we find adequate.*" (Emphasis supplied).

II

The Issue of Adverse Pre-Trial Publicity Is Not Supported by the Record and Not Raised in the Courts Below and May Not Be Raised Here

In Section II of its Petition (p. 15) Petitioner claims *for the first time* that it was precluded from a fair trial by adverse pre-trial publicity. Issuance of the Writ on those grounds should be denied for the following enumerated reasons:

1. The Record in this case does not contain any evidence of such pre-trial publicity.

2. The Record in this case does not contain any objection by Petitioner to proceeding to trial at Wichita, Kansas.

3. The Record in this case does not contain any objection by Petitioner during the course of the trial to proceeding further with the trial.

4. Petitioner's Motion for a New Trial does not raise the issue of adverse publicity either prior to or during the trial (R. 19).

5. Petitioner did not raise the issue of prejudicial pre-trial publicity in its appeal to the Court of Appeals for the Tenth Circuit.

In view of the above stated facts, Respondent respectfully invokes the long standing rule of this Court that Petitioner may not raise an issue now to its benefit not previously raised in the Courts below. *Ellis* v. *Dixon*, 349 U.S. 458 (1955); *Helvering* v. *Minnesota Tea Co.*, 296 U.S. 378 (1935).

CONCLUSION

Respondent submits that this case is and was a controversy of "fact" between two private corporations, not involving a question of public importance, which was decided by a jury in a United States District Court adversely to Petitioner and affirmed on appeal by the United States Court of Appeals for the Tenth Circuit. The case was carefully tried and reviewed by the District Court and extensively briefed for and reviewed by the Court of Appeals. On the jury findings and the judicial reviews already had Petitioner neither merits nor is entitled to the granting of a Writ of Certiorari and its Petition herein raises nothing further for review by this Court.

Respectfully submitted,

MARTIN J. PURCELL
1700 Bryant Building
Kansas City, Missouri 64106
LAWRENCE WEIGAND
830 First National Bank Building
Wichita, Kansas 67202
Attorneys for Respondent

Associate Counsel:

WILLIAM A. RUNDLE, JR.
1700 Bryant Building
Kansas City, Missouri 64106
BYRON BRAINERD
830 First National Bank Building
Wichita, Kansas 67202

Of Counsel:

MORRISON, HECKER, COZAD & MORRISON
WEIGAND, KURFMAN, BRAINERD, HARRIS & KAUFMAN

BLANK

PAGE

Office-Supreme Court, U.S.
FILED
JAN 12 1967
JOHN F. DAVIS, CLERK

PETITIONER'S REPLY BRIEF
No. 832

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1966

JAMAICA TIME PETROLEUM, INC.,

Petitioner,

vs.

FEDERAL INSURANCE COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF

M. LEWIS LEHMAN
By PAUL KALLMAN
4307 Crenshaw Boulevard
Los Angeles, Calif. 90008

Attorneys for Petitioner

ASSOCIATE COUNSEL

RALPH R. FRANK
PAUL KALLMAN
9460 Wilshire Boulevard
Suite 427
Beverly Hills, California

Attorneys for Petitioner

BLANK

PAGE

SUBJECT INDEX

		Page
I.	RESPONDENT'S JURISDICTIONAL ARGUMENT	1
II.	RESPONDENT'S FACTUAL ARGUMENT	2
III.	RESPONDENT'S LEGAL ARGUMENT	6
IV.	CONCLUSION	9

TABLE OF AUTHORITIES CITED

Cases

Blackburn v. Alabama, 361 U. S. 199, 4 L. Ed. 2d 243, 80 S. Ct. 274 — 7

Jamaica Time Petroleum v. Federal Insurance Company, 366 F. 2d 156 — 5, 8

State ex rel Spillman v. 1st Bank of Dickerson, 114 Neb. 423, 207 N. W. 674, 45 A. L. R. 1418 — 6, 7

Constitution

United States Constitution, 14th Amendment — 5, 6

Rules

Rule 19(1)(a) — 2

Rule 19(1)(b) — 2